

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
)	
Petition for Declaratory Ruling of)	WC Docket No. 09-154
American Electric Power Service)	
Corporation et al. Regarding the)	
Rate for Cable System Pole)	
Attachments Used to Provide Voice)	
Over Internet Protocol Service)	
)	

OPPOSITION



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I. Introduction.

The Commission should deny American Electric Power Service Corporation, Duke Energy Corporation, Southern Company, and Xcel Energy Services, Inc.'s ("Petitioners") Petition for Declaratory Ruling ("Petition")¹ for the following reasons:

- Applying the Telecom Rate to pole attachments used by cable operators to provide VoIP telephony services will raise costs to consumers and impede broadband deployment.
- There is no valid statutory or policy basis for applying the Telecom Rate to pole attachments used for providing VoIP telephony services.
- The Commission should seek to provide regulatory parity among cable operators and competitive telephone service providers.
- Electric consumers are not subsidizing cable companies.

For these reasons, the Commission must deny the Petition.

American Cable Association. Small markets and rural areas across the country receive video, high-speed broadband, and VoIP telephony service from more than 900 small and medium-sized independent operators represented by ACA.

ACA's membership includes a variety of businesses – family-owned companies serving small towns and villages, multiple system operators serving predominantly rural markets in several states, and hundreds of companies in between. These companies deliver affordable basic and advanced services, such as high-definition television, next-generation Internet access, and digital phone to more than 7 million households and

¹ Petition of American Electric Power Service Corporation, Duke Energy Corporation, Southern Company, and Xcel Energy Services, Inc. for Declaratory Ruling that the Telecommunications Rate Applies to Cable System Pole Attachments Used to Provide Interconnected Voice over Internet Protocol Service, WC Docket No. 09-154 (filed August 17, 2009).

businesses. More than 75 percent of ACA's members serve fewer than 5,000 subscribers.

II. Applying the Telecom Rate to pole attachments used by cable operators to provide VoIP telephony services will raise costs to consumers and impede broadband deployment.

Applying the Telecom Rate to pole attachments used by cable operators to provide VoIP telephony services will not further the important policy objective of increasing broadband deployment – a central goal of both Congress and the Commission. It will have the exact opposite effect. This is especially true in smaller and rural markets served by ACA's members, where the number of poles needed to deliver broadband technologies to subscribers in low-density areas magnifies pole attachment fee increases. Applying the Telecom Rate² to VoIP providers will have a dramatic effect on cable operators' ability to deploy broadband to consumers in these areas, and the Commission should reject the Petition.

Section 706 of the Telecommunications Act directs the Commission to “encourage the deployment of a reasonable and timely basis of advanced telecommunications capability to all Americans...by utilizing...measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.”³ Moreover, the recent Report on a Rural Broadband Strategy recognized that “[t]imely and reasonably priced access to poles

² 47 U.S.C. § 224(e).

³ Section 706 of the Telecommunications Act of 1996, Pub. L. No. 104-104, § 706, 110 Stat. 56, 153 (1996); 47 U.S.C. § 1302(a).

and rights of way is critical to the buildout of broadband infrastructure in rural areas.”⁴

Applying the Telecom Rate to pole attachments used for the provision of VoIP telephony service will achieve the **opposite** effect in the smaller and rural markets served by ACA’s members.

ACA members already face significant hurdles to deploying and upgrading their broadband networks. Applying the Telecom Rate to pole attachments used to provide VoIP telephony service will only compound these difficulties, and will have a disproportionately negative impact on the consumers residing in areas served by ACA’s members. As the Commission has recognized, in such areas there are fewer homes per mile of plant, so more poles – and correspondingly more attachments – are required to bring advanced broadband technologies such as VoIP to each subscriber’s home.⁵ As such, an increase in the rate charged for these pole attachments is multiplied for each subscriber in these smaller markets and rural areas.

Therefore, the Commission should reject Petitioners’ claim that the Telecom Rate must apply to pole attachments used by cable operators to provide VoIP telephony service.

⁴ Michael J. Copps, Acting Chmn., FCC, *Bringing Broadband To Rural America: Report on a Rural Broadband Strategy* (May 22, 2009), attached to *Acting Chairman Copps Releases Report on Rural Broadband Strategy*, GN Docket No. 09-29, Public Notice, 24 FCC Rcd. 7366, ¶ 157 (2009).

⁵ See, e.g., *In the Matter of Amendment of Rules and Policies Governing Pole Attachments*, Report and Order, 15 FCC Rcd. 6453, ¶ 118 (2000) (“The Commission has recognized that small systems serve areas that are far less densely populated areas than the areas served by large operators. A small rural operator might serve half of the homes along a road with only 20 homes per mile, but might need 30 poles to reach those 10 subscribers.”); *In the Matter of Caribbean Communications Corp., Petition for Special Relief*, Memorandum Opinion and Order, 17 FCC Rcd. 7092, ¶ 14 (2002) (noting that systems with more than 15,000 subscribers average 68.7 subscribers per mile, while small systems service on average only 35.3 subscribers per mile.). More than half of ACA’s members’ serve fewer than 1,000 subscribers and serve even fewer subscribers per mile).

III. There is no valid statutory or policy basis for applying the Telecom Rate to pole attachments used for providing VoIP telephony services.

It is well-settled that pole owners are fully compensated for pole attachments under the Cable Rate formula. Therefore, there is no statutory or policy bases for applying the Telecom Rate to pole attachments used for providing VoIP telephony services.

Under the Pole Attachments Act, “a [pole attachment] rate is just and reasonable if it assures a utility the recovery of not less than the additional costs of providing pole attachments....”⁶ As the National Cable & Telecommunications Association (“NCTA”) and others have noted – and as the courts have routinely held – pole owners are fully compensated for pole attachments fees calculated under the Cable Rate formula.⁷ VoIP services are provided using the very facilities over which cable operators provide cable and Internet services and will impose no additional burden on the underlying pole owners’ facilities. Applying the Telecom Rate for VoIP services provided by cable operators is unreasonable and would only overcompensate pole owners. The Cable Rate is “just and reasonable,” and should therefore apply to pole attachments use to

⁶ 47 U.S.C. § 224(d)(1).

⁷ 47 U.S.C. § 224(d); see *In the Matter of Implementation of Section 224 of the Act; Amendment of the Commission’s Rules and Policies Governing Pole Attachments*, WC Docket No. 07-245, Comments of NCTA at 8-13 (filed Mar. 7, 2008); *In the Matter of Implementation of Section 224 of the Act; Amendment of the Commission’s Rules and Policies Governing Pole Attachments*, WC Docket No. 07-245, Comments of the Alabama Cable Telecommunications Association, *et al.*, at 4, 16-18 (filed Mar. 7, 2008). See also *Alabama Power Co. v. FCC*, 311 F.3d 1357, 1370-71 (11th Cir. 2002) (“Before a power company can seek compensation above marginal cost, it must show with regard to each pole that (1) the pole is at full capacity and (2) either (a) another buyer of the space is waiting in the wings or (b) the power company is able to put the space to a higher-valued use with its own operations. **Without such proof, any implementation of the Cable Rate (which provides for much more than marginal cost) necessarily provides just compensation.**”) (emphasis added).

provide VoIP telephony services.⁸

Moreover, no policy basis exists for applying the Telecom Rate to pole attachments used for VoIP telephony services. Independent cable operators have taken the lead in providing VoIP telephony services to small and rural markets throughout the United States. However, upgrades necessary to provide these advanced services require substantial capital investment and administrative costs. According to one expert, if the Telecom Rate is applied to cable VoIP customers, the average annual cost increase ranges from \$27.65 to \$89.18 per customer.⁹ Of course, the increase in cost would only be magnified in the smaller markets and rural areas served by ACA's members.

Pole owners are fully compensated for pole attachments under the Cable Rate formula. Additional costs associated with applying the Telecom Rate to VoIP services will only increase these costs and slow or prevent independent cable operators' deployment of broadband and advanced broadband technologies. For these reasons, the Commission must reject the Petition.

IV. The Commission should seek to provide regulatory parity among cable operators and competitive telephone service providers.

Instead of applying the Telecom Rate to pole attachments used for providing VoIP telephony services, the Commission should seek to provide regulatory parity among cable operators and competitive telephone service providers by reducing the

⁸ Petitioners correctly note that the Commission has not yet ruled whether VoIP telephony service is a "telecommunications service," an "information service," or some other service. Petition at 3.

⁹ *In the Matter of Implementation of Section 224 of the Act; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, WC Docket No. 07-245, Comments of NCTA, Appendix B, ¶ 22,

rate competitive telephone service providers pay for pole attachments. Moreover, such action would also increase competition and the deployment of broadband and other advanced broadband technologies.

Petitioners assert that applying the Cable Rate to pole attachments used for providing VoIP telephony service “would give an unfair competitive advantage to cable company VoIP providers relative to competitive telephone service providers subject to the Telecom Rate.”¹⁰ Yet, Petitioners ignore instances where **cable operators** are at a competitive **disadvantage** relative to competitive telephone service providers. For instance, the Communications Act provides that common carrier providers of voice services are eligible to receive universal service funds (“USF”).¹¹ However, interconnected VoIP providers are not able to access USF funds – despite the fact that Commission regulations require USF contributions from all voice providers, including interconnected VoIP providers.¹²

The Commission should therefore look at ways to reduce the pole attachment rate for all telecommunications providers to provide regulatory parity. As noted above, **pole owners are fully compensated under the Cable Rate formula**. Lowering the pole attachment rate for all telecommunications providers would do more to promote broadband deployment and innovation than **increasing** the pole attachment rates for cable operators providing VoIP telephony service to consumers who might otherwise

Table 4 (Declaration of Dr. Michael D. Pelcovits) (filed Mar. 7, 2008).

¹⁰ Petition at 3-4.

¹¹ 47 U.S.C. § 254; 47 C.F.R. § 54.201.

¹² See 47 C.F.R. § 54.706(a) (“Certain other providers of interstate telecommunications, such as...interconnected VoIP providers, also must contribute to the universal service support mechanisms.”).

not have access to alternatives telephone services. Such action would also directly address Petitioners' concern that competitive telephone service providers are at a competitive advantage relative to cable operators providing VoIP telephony services.

V. Electric consumers are not subsidizing cable companies.

The Cable Rate formula is just, reasonable, and fully compensates pole owners. Petitioners' assertion that electric consumers are subsidizing cable companies is a red herring.

Petitioners assert that "[e]lectricity consumers, many of whom do not subscribe to VoIP services, must not be forced to subsidize cable giants like Comcast and Time Warner Cable."¹³ The Cable Rate is a cost-based formula that fully compensates pole owners for the costs associated with cable operators' use of pole attachments to provide VoIP telephony services to consumers. As the Commission has noted, a rate based on cost cannot be a subsidy.¹⁴

Petitioners' assertion that electric consumers are subsidizing cable companies is a red herring and should be rejected.

VI. Conclusion.

The application of the Telecom Rate to pole attachments used by cable operators to provide VoIP telephony services will raise costs to consumers and impede the deployment of broadband and other broadband technologies. There is no valid statutory or policy basis for applying the Telecom Rate to pole attachments used to

¹³ Petition at 23.

¹⁴ *In the Matter of Request to Update Default Compensation for Dial-Around Calls from Payphones*, Report and Order, 19 FCC Rcd. 15636, 15646, ¶ 29 (2004) ("If the rate is cost-based, it cannot be a

provide VoIP telephony services. The Commission must deny the Petition.

Respectfully submitted,

AMERICAN CABLE ASSOCIATION



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‘subsidy.’”).

CERTIFICATE OF SERVICE

I, Jeremy M. Kissel, attorney with the offices of Cinnamon Mueller, certify that a true and correct copy of American Cable Association's Opposition to the American Electric Power Service Corporation, Duke Energy Corporation, Southern Company, and Xcel Energy Services, Inc.'s Petition for Declaratory Ruling, WC Docket No. 09-154, was served on the following individuals by first class mail on September 24, 2009:

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September 24, 2009